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Subject:—

File No. O. Watan/42

Legal DEPARTMENT

A BRANCH

Opinions under the

Bombay Hereditary Offices

Act, 1874.

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In the First Appeal No. 180 of 1941 against the order of the Subordinate Court in the Civil Application No. 545 of 1941 the High Court has interpreted the decree of the Joint First Class Sub-Judge, Surat, in Regular Civil Suit No. 54 of 1934 as follows:- "The lower Court's decree makes it perfectly clear to my mind that actual receipt of by applicants (defendants) is a condition precedent without which opponent cannot proceed in execution. It follows that the present Darkhast is bad in so far as it proceeds against sum not actually received by applicants, though it is competent as regards any sums already received by them. The proper order is..... Rule absolute as regards the amount not yet actually received by applicants and discharged as regards the amount already received by them." The effect of that order of the High Court would be the cancellation of the order served on the Mamlatdar of Olpad prohibiting him from paying the allowance to the petitioners-defendants. Government was not also a party to the litigation. There would therefore be no legal objection to Government continuing to pay the allowance as hitherto done to the petitioner-defendants Narendra Singh and the heir of his deceased brother Moti Sinhji, if any, since Mahida UdesinghJi alias Umangsinhji's remedy under the decree would be against the defendants and not against Government. The view taken by the Secretary, R.D.,.in his note at pages 51-52 ante is correct.

Id/- P.N.M.
16-1

Remembrancer of Legal Affairs.

U.R. to R.D.,NO. 464, dated the 17th January 1942.

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It appears that certain Pargana Watan lands settled under the Gordon Settlement which were resumed by Government for non-payment of Mahal Judi under Government Resolution, Revenue Department No. 6792/33, dated 24th May 1937 were regranted to the holders thereof subject to the conditions mentioned in the form of the Sanad appended to Government Resolution, Revenue Department No. 6792/33 dated 20th February 1940. The Sanad provides for the "regrant as an act of grace of the lands to the holder as Parrana Watan and for continuance as private property of the person who shall be its lawful holder on the following conditions namely:-

(i) the said holder shall pay to Government ---

(a) the amount of judi specified in column 5 of the schedule hereto annexed or if Government enhances the same under condition (ii) herein below mentioned the enhanced amount of judi so fixed under the said condition; and

(b) the amount of water rate etc.;

(ii) the said amount of judi specified in column 5 of the schedule hereto annexed shall in the discretion of Government be liable at any time to be enhanced up to the extent of the amount of the full assessment agricultural or non-agricultural, as the case may be;

(iii) in default of payment of any sum payable under this Sanad on the due date fixed under the said rules, the same shall be recoverable as an arrear of land revenue.

And in consideration of the aforesaid conditions ---

First - the said lands shall be continued without demand of service and without any objection or question on the part of Government as to the rights of any lawful holders thereof.

Second - No Nazrana or other demand on the part of Government in addition to the judi fixed by Government shall be imposed on account of the succession of heirs lineal collateral or adopted and permission to make any such adoption need not hereafter be obtained from Government."

The questions raised for the consideration of the R.L.A. are:-

(1) Whether these lands are service lands, if not;

(2) Whether an Inam under such Sanad is a transferable private property;

(3) Whether the concession of paying specified judi of an amount less than the full assessment shown to the holder as an act of grace may be or must be continued to the transferees beyond the limits of the original Watan family;

(4) Whether in the case of an alienation of such land to a stranger the specified judi can be enhanced up to the extent of the amount of full assessment under the stipulation in the new Sanad, and if so by whom; and

(5) Whether the resumption rules of 1908 apply to such Inam.

The lands in question were resumed by Government in 1937 and by virtue of resumption, they became Khalsa. In other words the lands were freed from their watan attribute as well as from the conditions of the Gordon Settlement Sanad.(See R.L.A.'s opinion No. 311 dated 15th January 1941; 14 B.L.R. 563 and 38 B.L.R. 193). Thereupon the Crown made a regrant of the lands, and by the terms of the Sanad relating to the regrant, the Crown created a fresh Inam and called it Pargana Watan. The nature of the fresh Inam is however ascertained and governed not from the name 'Pargana Watan' but from the terms of the Sanad. A perusal of the terms shows that the Inam bears all the characteristics as to alienability, adoption, succession etc., which are appropriate to a personal Inam. The regrant cannot therefore be regarded as a Watan of any kind, nor be deemed as relatable to section 22 read with section 15 of the Bombay Hereditary Offices Act, 1874. Plainly it is not connected with any hereditary office, nor does it stipulate for the rendering of any service. It is a new type of Inam freshly created and called Pargana Watan but classified under a hitherto non-existing category (Class V-A at p.35 para 5 of Anderson's Revenue Accounts Manual). It partakes of the qualities of a personal Inam, with the option left in Government to destroy this Inam character at any time by increase in the judi leviable up to the level of assessment. The reply to the first question is therefore in the negative.

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The lands which are private property carry with them the incident of transferability. Consequently these lands are clearly transferable Under the Sanad the lands shall be held as private property by its lawful holder. An alienee beyond the

limits of the Watandar family would also be a lawful holder Consequently it would be open to Government but not obligatory on it to continue even to such alienee the concession of paying the specified judi of an amount less than the full assessment shown to the holder as an act of grace. According to the conditions of the regrant as specified in the Sanad it is entirely within the discretion of Government to raise it up to the full assessment irrespective of judi whether or not the holder is a watandar. In view of the phrase underlined above in condition (ii) of the Sanad, it is Government and not the Collector that would be entitled to withdraw the concession and levy full assessment.

The Resumption rules are framed by Government regarding the resumption and continuance of service land. The lands regranted in the present cases are as stated above no longer service lands. The Resumption rules do not therefore apply to these lands.

Id/- P.N.M.
5/5

Remembrancer of Legal Affairs.
Sd/- 5/5

U.R. to R.D.,No. 3779, dated the 6th May 1942.

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A consent decree has the force of a decree passed by a Court and no appeal shall lie from such a decree (see section 96(3) of Civil Procedure Code). So long therefore as a consent decree stands it is not open to either party thereto to give it the go-by even if it contains clauses that are bad in law(see Cowsji Vs. Kisandas 35 Bom. 371). There is nothing in the High Court decree in appeal No.115 of 1923 which would make the consent decree ineffective. There is therefore no legal objection to giving effect to the consent decree passed by the First Class Sub-Judge, Belgaum in Civil Suit No. 189 of 1933 between Narayan and Jeevaji. The fact that more than 6 years have passed since the date of entering the name of Jeevaji in the Pali Register would be no bar under section 36(3) of the Bombay Hereditary Offices Act to recognising the claim of Narayan for an entry in the Pali Register in conformity with the terms of the Consent decree (see R.L.A.'s opinion No. 9221 dated 25th October 1941).

Id/- P.N.M.
19/5

Remembrancer of Legal Affairs.

Sd/- S.R.P.
19/5

U.H. to R.D.,No. 4170, dated the 20th May 1942.

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It appears that the only piece of evidence relied on by the holders of the Mamle Deshpande Taraf Bankapur Watan (called the Tadas watan) in support of their claim to the Deshpande Watan, Bankapur is the statement made by Ramrao Nilkantrao (the sanad holder of the Tadas watan) before the Inam Commission. In this statement it is alleged that the whole wata i.e. the Tadas wata and Bankapur watan, was originally acquired by Lahmajipant and out of it the Bankapur watan was being enjoyed by Ramappa Shivappa. If this statement is taken to be true, then it would follow that both watans were acquired by Lahmajipant shown in the geneology at page 131 of the Collector's file II and the present claimants would be Collaterals within the watandar family within the meaning of clause 1 of the Gordon Settlement. But that statement of Ramrao Nilkanthrao does not appear tobe correct in that the nearest common ancestor of the claimants and Raghunath Nilkanth is the grandrather (Timajipant) of the alleged original watandar. Furthermore, the statement does not appear to be admissible in evidence under any part of section 32 of the Evidence Act. Under clause (3) of section 32 the statement of a dead person is relevant when such statement is against the pecuniary or proprietary interest of the person making it or when true it would expose him to a criminal prosecution or to a suit for damages. The statements to be admissible under this provision must also have been against interest at the time when they were made; it is not enough that they might turn out to be so afterwards. (Smith Vs. Blackey L.R. 2 Q.B. 326; Sarkar's Evidence Act, p. 317) there is nothing to show that the statement made by Ramrao Nilkanthrao before the Inam Commission was against his own interest at that time since such statement could not adversely affect his claim to the Tadas watan and he did not set up any claim to the Bankapur watan. Since he did not set up any claim to the Bankapur watan, any recital about it in that statement is likewise not admissible under clause (7) of section 32. Consequently if this statement is eliminated, there would remain nothing to prove that the claimants are collaterals within the watandar family of the Bankapur watan

family,. The view taken by the Collector in his letter at p. 1 and by the Commissioner in is endorsement at p.3 ante is correct. There would therefore be no legal objection to resuming the watan.

Id/-,P.N.M.
5/6

Remembrancer of Legal Affairs.

Id/- S.R.P.
4/6

U.R. to R.D., No. 4571. dated the 6th June 1942.

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The questions for consideration are:-

(1) Which of the three claimants (1) Ambajirao (2) Krishnabai and (3) Vithalrao should be recognised as representative watandar to the Patilki and Kulkarniki watans of the Nipani Desgat family.

(2) Who should be held to be the original acquiror of the watan?

(3) If the adoption of Murarrao alias Jijajirao is held to be invalid, whether Ambajirao the son of Murarrao alias Jijajirao can claim the watans by virtue of his position in the natural family.

2. The facts of the case are as under:-

It appears that one Shidhojirao Sar Lashkar was the acquirer of the Nipani Deshgat in the Belgaum District and the Gordon Settlement was effected with his adopted son, Murarrao. After Murarraro's death in June 1864 without any issue his widow Rakhambai adopted Shiddojirao alias Appasaheb in December 1864 who died without any issue in March 1881 leaving behind him his adoptive mother and his wife Laxmibai. Government refused to recognise the claims of either Rakhambai or Laxmibai to succed to the Deshgat. However on a request being made by Rakhambai for thex second time she was informed that Government would not object to her adopting a second son if she desired, but the son so adopted would be entitled to succed to the property of his adoptive father to the extent of the watan lands and cash allowances.(see G.R.,R.D.,No. 6197 dated the 8th September 1882). F Government refused to adopt a son to her late husband Shidhojirao for thewatan property (see G.R.F,R.D., No. 8909, dated the 19th December 1882). Rakhambai adopted Raghunathrao in 1883 and the watan lands and cash allowances were continued to her as per G.R.,R.D.,No. 6197, dated the 8th December 1887. Inspite of refusal of permission by Government it appears that Laxmibai adopted, Murarrao alias Jijajirao in 1886 and his adoption was held to be valid by the Civil Court in Civil Suit No. 359 of 1888.

He succeded to all the non-watan property of the family while Rakhambai's adopted son Raghunathrao succeded only to the Deshgat watan property. These properties were jointly managed by Raghunathrao and Jijajirao and as they jointly incurred liabilities, Government ordered the assumption by the Court of Wards of the Superintendence of the Watan as well as the non-watan property of the Nipani Deshgat family in 1907 (see G.R.,R.D.,No. 3103, dated the 27th March 1906 and No. 10855, dated the 8th November 1907). Since then these properties are still under the management of the Court of Wards. Raghunathrao died in 1918 and after his death his widow Krishnabai gave birth to a posthumous son who too died in September 1918 whereupon Government held that the Deshgat watan had lapsed to Government.

It appears that after the death of Shidojirao the adopted son of Rakhmabai, the Deshgat watan and the Patilki and Kulkarni watan of the family ere dealt with separately. In 1883 an order was passed entering the Deshgat watan in the name of Raghunathrao and the service watan in the name of Laxmibai . Laxmibai's name thus came to be entered in Pali Register in 1888. Inspite of the the adoption of Murarrao alias Jijajirao being held valid by the Civil Court no attempt was made by Murarrao alias Jijajirao to get his name entered till 1924 when the the Collector ordered it in his favour. Thereupon Laxmibai filed a Civil Suit No. 281 of 1926 against Murarrao alias Jijajirao and the Secretary of State for a declaration that the former was not her validly adoption son. Government applied for striking off the name of the Secretary of State and consented to abide by the result of the suit. Murarrao did not put in an appearance, probably believing that the suit was not properly framed and the Court of Wards should have been named as his guardian. The suit was ultimately decided exparte and the Court held that Murarrao's adoption was not proved. Thereafter Laxmibai's name was restored to the Pali register on 28th February 1928.

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Laxmibai died on 13th September 1937 whereupon the question of succession to the Patilki and Kulkarni ~~x~~ watan had once again to be settled. An heirship enquiry was held and claimants were as follows:-

1. Krishnabai (No. II in the pedigree)
2. Murarrao alias Jijajirao (No.I)
3. Chandrabai (No.IV)
4. Vithalrao (No.III)
5. Manasaheb Dhararao.

On 26th September 1938, the District Deputy Collector, Belgaum directed that Murarrao alias Jijajira (No.I) should be entered as heir to the Patilki and Kulkarniki watans in succession to the deceased Laxmibai The District Deputy Collector in his order held the adoption of Murarrao alias Jijajirao by Laxmibai to be void but stated that the original acquirer of the watan was Shidgouda (A in the tree)and that Murararrao alias Jijajirao had a superior claim as a member of his natural family. Against this order climants (3) and (4) appealed to the Collector of Belgaum. Murarrao alias Jijajirao, therefore, also appealed to the Collector with a request to delete these remarks from the District ~~xxxx~~ x x Deputy Collector's Order. By his order dated the 17th May 1940, the Collector of Belgaum held that Shidgauda was the original acquirer of the watan and that Murarrao alias Jijajirao was the nearest heir whether his adoption by Laxmibai was valid or not. The request of Murarrao alias Jijajirao to delete the remarks was rejected as the remarks were held to be mere obiter dicta. The ~~xjsex~~ rejected claimants then appealed to the Commissioner, S.D. against the order of the Collector. The Commissioner, S.D. held that Sidhojirao sar Lashkar (marked B in the pedigree) was the original acquirer of these watans and that Murarrao alias Jijajirao whose adoption by Laxmibai was declared invalid by the Court was not

a watandar at all. He accordingly directed that since Krishnabai (NO. II) was the only existing descendant of the original watandar, the watans should be entered on her name. The entire property is at present under the management of the Court of Wards. Consequently the Court of Wards on behalf of Ambajirao the son of Murarrao alias Jijajirao (since dead) has now appealed to Government against the Commissioner's order. Vithalrao alias Appasaheb Shindhojirao and Chandrabai have also appealed to Government.

It is stated in para2 of the R. D. note at pp. 81-82 ante that ordinarily on the death of Laxmibai the last sole representative watandar, her adopted son Murarrao alias Jijajirao and through him his son Ambajirao should have succeded to the watan as Representative watandar but the adoption of Murarrao alias Jijajirao which was held valid in a decree in Civil Suit No. 359 of 1888, has been held to be invalid by an exparte decision in Civil Suit No. 281, of 1926. The Government pleader, High Court who has been appointed by the Court of Wards to appear in this case on behalf of Ambajirao, contends that the exparte decision is null and void as Murarrao alias Jijajirao was not rppresented in the said suit by the Court of Wards as required by Section 32 of the Bombay Court of Wards Act, 1905.

3. Where there are two or more conflicting decrees the last decree alone is the effective decree and it is this decree and not any other which can operate as a res judicata (see Rajani Vs. Ajmuddin 48 U & J 577, Mulla's C.P.C. 11th Edition pp. 92.). Evidently the decree in Civil Suit No. 359 of 1888 and the decree in Civil Suit No. 286 of 1926 are conflicting since the adoption

adoption of Murarrao alias Jijajirao is held valid by the former and invalid b the latter. Unless therefore the decree of 1926 is proved to be a nullity or not binding , that decree will operate as res judicata. The main obstacle in the way of recognising Ambajirao the son of Murarrao alias Jijajirao as Representative Watandar is this exparte decree of 1926. Under section 44 of the Evidence Act any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 40, 41 or 42 and which has been proved by the adverse party was deliver it or was obtained by fraud or collusion. Every species of judgment will be rendered inadmissible in evidence on proof being given that the Court which pronounced it had no jurisdiction. A judgment delivered by a Court not competent to deliver it e.g. which had nox jurisdiction over the parties or the subject matter of the suit x is a mere nullity and section 44 empowers the Courts to ignore orders issued by Courts without authority (see Keshavlal Vs. Amarchand 57 Bom. 456). Where a decree obtained by fraud is sou ht to be used against a person, he is entitled to show under section 44 the nature of the decree notwithstanding the fact that he has not previously taken steps for its cancellation. But he cannot be permitted to challenge the decree unless he sets out specifically the circumstances which constituted the alleged fraud on him and the Court (Pulin Vs. Satya 70 I.C. 548; Sarkar's Evidence Act, pp. 426). Under section 44 it is competent for a party to a suit or other proceedings to show in it that a judgment or decree inter parties and which has been proved against him by his adversary in that suit was obtained by fraud without having it set aside (6 Bom. 703; 19 Bom. 821, 826 approved) A judgment or decree obtained

by fraud upon a Court does not bind such Court, nor any other and its rullity upon this ground, though it has not been set aside or reversed may be alleged in a collateral proceeding (Hare Krishna Vs. Ramesh 6 P.L.J. 373; 62 I.C. 962). The question, therefore, for onsideration is whether the decree of 1926 was passed without jurisdiction and if not whether it was obtained by fraud. Section 31 of the Court of Wards Act, 1905 inter alia provides that no suit relating to the person or property of any Government ward shall be brought in any Civil Court until the expiration of two months after notice in writing etc. Under section 32 in every suit brought by or against a Government ward the manager of the ward's property or where there is no maganer, the court of Wards having the superintendence of the ward's property shall be named as the next friend or guardian for the suit, as the case may be. In Sayet Amir Saheb Vs. Shekh Masleudin (40 Bom. 541) it was held that the omission to comply with section 32 of the Court of Wards Act might be treated as a mere defect or irregularity in procedure not affecting the merits of the case or the jurisdiction of the Court, but every case must be judged upon its own facts to see whether the omission had affected the merits or not. In Hargovind Fulchand Vs. Bai Hirabai (44 Bom. 986) it was held : "Even if non-compliance with the provisions of section 32 of the Court of Wards Act may not be fatal to the suit as pointed out in Sayet Admirsaheb Vs. Shekh Masledin (40 Bom. 541) it is clear that the absence of a notice required by section 31 if the section applies would be fatal to the suit". In the present case neither section 31 nor section 32 has been complied with. No notice of the suit was given

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was given to the Court of Wards and the Court of Wards was not made a party to the suit as guardian of its ward Murarrao. That being so, the First Class Sub-Judge had not jurisdiction to try the civil No. 286 of 1926. The next point is whether it is ~~is~~ tainted by fraud. It is now well established that a decree cannot be set aside as fraudlent on the allegation that it was obtained by perjured evidence or that claim was false. It must be shown that the plaintiff was prevented by some fraud or contrivance from appearing and placing his case before the Court i.e. the alleged fraud must be extrinsic fraud ((Sarkar's Evidence Act, pp. 430). In Venkapp Naik Vs. Subha Naik (29 Mad. 216 at p. 219) it was held that a suit would lie to set aside a judgment on the ground of fraud, if the plaintiff would succeed in satisfying the Court that the judgment was obtained by fraud committed by the defendant upon the Court by committing a deliberate perjury and suppressing evidence. This view of the Madras High Court is supported by some English cases also. (see Cole Vs. Langford 1898, 2 Q.B. 295; Sarkar's Evidence Act, p. 430) Murarrao did not put in his appearance in Civil Suit No. 286 of 1926, he being under the impression that as a ward of the Court of Wards he was to be represented either by the manager or the Court of Wards. He should have moved the Court of Wards to take action in the matter, or should have taken steps to prevent an exparte decree being passed against him. He did neither and consequently I do not think there is any case of fraud being committed on him. It appears however that there is a case of fraud being committed on the Court by suppression of the most material evidence namely the decree of 1838. Civil Suit No. 286 of 1926 was clearly barred by res judicata and the Court would have been bound

to hold it accordingly if the decree of 1888 had been brought to its notice. Consequently it appears that the decree of 1926 is tainted by fraud committed on the Court. Ambajirao would not therefore be bound by the decree of 1926. It would be clear injustice if Murarrao should be recognised as the validly adopted son of Laxmibai for purposes of succession to the non watan property but not to the Patilki and Kulkarniki watan. It is true that Government had stated in Civil Suit No . 286 of 1926 that it would abide by the decision of the Court and effect was given to the decision of that suit by replacing Laxmibai's name in the Pali register . But that was on the assumption that the decree thus passed by the Court was a valid one. There is good ground for holding that the decree of 1926 was invalid. In the circumstances, there would, it appears, be no legal objection to recognising Ambajirao as Representative of watandar.

4. If this view is accepted, the other points raised by R.D. will not survive.

Id/- P.N.M.
9/6

Remembrancer of Legal Affairs.

Id/- S.R.P.
8/6

Re U.R. to R.D.,No. 4765, dated the 10th June, 1942...

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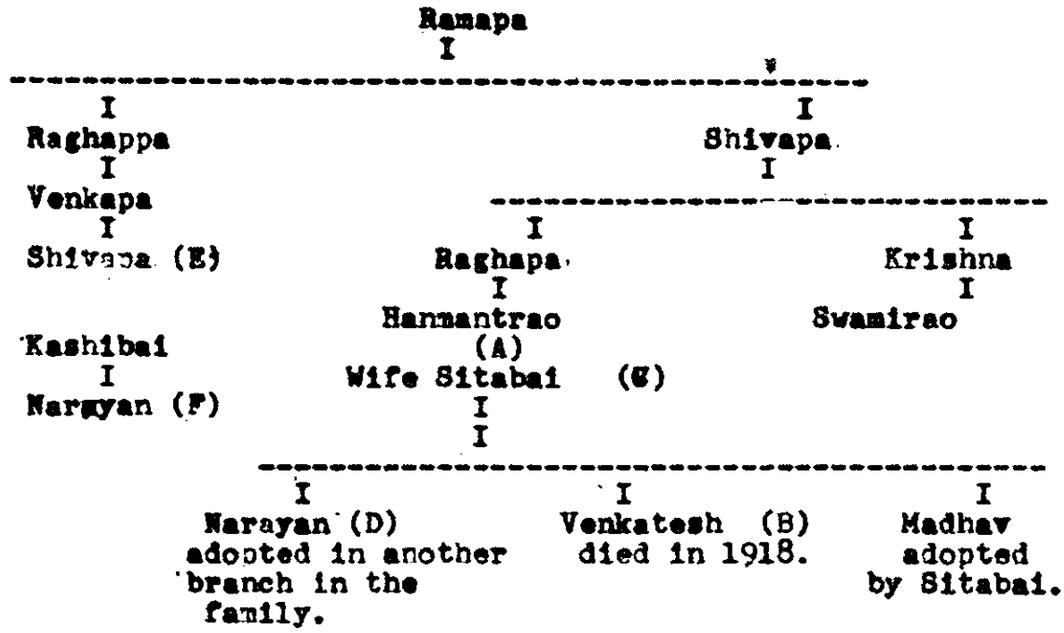
Office of the R.L.A.

The Kulkarni right of service of 4 annas in Kantgi and 8 annas in Mugnur in Hungund Taluka, and 8 annas in each of the town villages of Helur, Layadegundi, Budangad and Katnalli in Badami Taluka together with certain Kulkarni Inam Lands were held by one R.W.Hanmantrao who died in 1915 leaving behind him a widow Sitabai and minor son Venkatesh who died unmarried in 1918. The geneology of the family is as follows:-



Hanmantrao, Venkatesh and Sitabai are shown as (A), (B) and (C) respectively in the above geneological tree. Sitabai's other son Narayan (D) had gone in adoption to another branch of the same family,. After Venkatesh's death the Kulkarni right of service was entered in the name of Shivapa (E) the adoptive father of Narayan(F) and the Inam lands now in dispute were entered in the name of Sitabai / (C) in the village records as an heir to her deceased son Venkatesh. Two of these lands were sold by Sitabai in 1925 to one Narayan Madhav Deshpande a watandar of the same watan. In the year 1933, on the day of her death, Sitabai adopted the son of Narayan Madhav Deshpande to her deceased husband, Hanmantrao(A). After her death the lands which were in her possession were inherited by her adopted son Madhav Hanmant Deshpande.

Narayan Shriniwas (F) the son of Shivapa since dead, who holds the right of service, then made an application to the Assistant Collector, Southern Division, claiming the restoration of the lands held by Narayan Madhav Deshpande and his natural son Madhav Hanmant Deshpande on the ground that Sitabai could not inherit th ese lands under section 2 of Act V of 1886 as it stood in 1918 and had no right to alienate the lands and requesting that the alienations being illegal might be set aside. The Assistant Collector, S.D., Bijapur, passed an order on 22nd May 1940 under section 11 of the Bombay Hereditary Offices Act, holding Sitabai to be a non-watandar and declaring the alienations null and void and directing restoration of the lands in dispute to Narayan Shriniwas the applicant. Against this order, Narayan Madhav Deshpande and his son ~~xxxx~~ i.e. Sitabai's adopted son Madhav Hanmant Deshpande made an appeal to the Collector of Bijapur. On 25th November 1940 the Collector held that Sitabai was a watandar and set aside the Assistant Collector's order. Narayan Shriniwas then preferred a second appeal to the Commissioner, S.D., against the Collector's order. The Commissioner held relying on ~~KG~~ R.No. 1286 dated 6th February 1912, that Sitabai was not a watandar and that she came into possession by virtue of an alienation within the meaning of section 11 of the Bombay Hereditary Offices Act, and he therefore reversed the Collector's order and restored the Assistand Collector's order in toto. Against this order of the Commissioner S.D., Narayan Madhav Deshpande and Madhav Hanmant Deshpande have now preferred an appeal to Government.

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2. In this connection R.D. has raised the following two questions for the consideration of the R.L.A.

(1) whether Sitabai can be regarded as a non-watandar; if so,

(2) whether section 11 of the Bombay Hereditary Offices Act, is correctly applied in this case.

3. In the case it would be better to deal with the second question first. It is undisputed in this case that the property is watan property and that Narayan Madhav Deshpande and Madhav Hanmant Deshpande the alienees are watandars of the same watan.

The lands in this case are not assigned for service. Section 11 read with section 10 of the Bombay Hereditary Offices Act provides inter alia that when any watan or part thereof not assigned under sectio· 23, has passed into the ownership or beneficial possession of any person not a watandar of the sam watan, the Collector shall declare the alienation null and void. In this case whether Sitabai is a watandar or not, the watan property at present has not passed into the ownership or beneficial possession of persons who are not watandars of the same watan Both Narayan Madhav Deshpande and Madhav Hannant Deshpande are admittedly watandars of the same watan and the Collector cannot take action under section 11 at this stage. Whether the title of these alienees is defective or not is not for the Collector to decide. The aggrieved party has always a remedy in a civil Court. In para ¶ 2 of R.L.A.'s opinion No. 6800 dated 27th July 1940 it was held that action under section 11 should primarily be taken only in cases of original alienations i.e. where a land passes from the hands of a watandar into those of a non-watandar. The object of sections 10 and 11 clearly is that th lands should be restored back to watandars. It was therefore held that merely on the ground that there is no evidence to show that the original alienor was a watandar, the alienations should not be interfered with. The fact to beregarded in applying section 11 of the Bombay Hereditary Offices Act is whether the present holder of the watan property is a stranger to the watan family. Where the present holder is a watandar of the watan family., action under section 11 is not competent and can properly be refused. Refusal to take action under section 11 would not bar a civil suit as between the parties for restoration of the land to the holder of a better title. In the present case therefore action under section does not appear to be proper.

4. In the above view the question whether Sitabai is a watandar or non-watandar is not very material. It is, however, examined as it is specifically raised by R.D. The expression "Watandar" as defined in section 4 of the Bombay Hereditary Offices Act means " a person having an hereditary interest in the watan etc." "Hereditary interest" means an

interest acquired by inheritance as distinguished from an interest acquired by purchase, gifts or other mode of acquisition and the pharase "persons having an hereditary interest in a Watan" should be confined to persons having a present interest of hereditary character in the Watan (Chinnava Vs; Bhimangouda, I.L.R. 21 Bom. 787, Phadnis' Watan Act pp,. 11-12 and 13). Succession is never held in abeyance. In the present case the succession opened in 1918 when Venkatesh the last male holder of the watan died unmarried. His mother Sitabai according to the law then in force (i.e. section 2 of Act V of 1886 before it was amended by Act XI of 1923) was postponed in the order of succession to the Watan to Shivappa (E in the geneology) a male member of the family qualified to inherit the Watan. Consequently the Watan property left by Venkatesh vested in Shivappa and it could not be subsequently divested by any adoption made by Sitabai. (See Bhimabai Vs. Tayappa Murarrao, 37 B.L.R. 598) . It is nok doubt true that on death of Venkatesh, Sitabai entered into possession of the Watan lands; but her possession, being not referrable to inheritance, would be that of a trespasser liable to be evicted by Shivappa. Having then no interest of a heredita y character in the Watan property Sitabai could not bv the mere fact of her having come into possession of such property be considered to be a Watandar of the same Watan. (see G.R.,R.D.,No. 1286, dated 6th February 1912 and the R.L.A.'s opinion No. 108 dated 13th January 1912 quoted in the preamble of that G.R.).

PSM. 7/5

Id/- P.N.M.
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Remembrancer of Legal Affairs

U.R. to R.D.,No. 6853, dated the 21st August 1942.

Office of the R.L.A.

It appears that the applicant's father Govind Krishna Deshpande and one Krishnaji Ramchandra Deshpande commuted their Kulkarni right of service in the villages of Hirekamshi and Shivalli in the Hangal Taluka of the Dharwar District in 1917. Govind Krishna stated before the Mamlatdar of Hangal in November 1916 that he was not willing to commute his eight annas share in the hak unless he was appointed talati of Hirekamshi for life i.e. till he attained the age of retirement on pension. The Collector accepted the commutation in his No.Com. S.R. 31 dated 23rd February 1917, but ordered that Govind Krishna should be appointed talati of the "Sama consisting of Chikkamshi and Shirgod on Rs. 13 per month provisionally as Hirekamshi was too small for being formed into a separate "Sama" Govind Krishna however declined to accept it and at his request he was appointed Asami Kulkarni of Hirekamshi. In 1929 he applied to the Collector that he should be appointed talati of his village and should be given the privileges of grade promotion etc. in accordance with the condition insisted on by him at the time of commutation failing which his orginal right to the hereditary office should be restored. The Collector replied that he had been appointed Asami Kulkarni of Hirekamshi at own request and that nothing could be done unless the hakdar Kulkarni of the adjoining village of Gondi was willing to commute his right so that Gondi and Hirekamshi could be formed into a Sama for the appointment of a talati. Thereafter— Thereafter Govind Krishna remained silent and continued to officiate as Asami Kulkarni of Hirekamshi till 20th June 1940 when he was ordered to retire as he had attained the age of 55. The proceedings for a fresh appointment of asami Kulkarni for Hirekamshi stated and the the applicant was one of the candidates for appointment but he was not selected. Thereafter he applied to the Assistant Collector disputing the validity of the commutation order on the ground that there was failure to observe the condition which required his father to be appointed talati of Hirekamshi and that there was breach of the provisons of section 73 of the Bombay Hereditary Offices Act. The Assistant Collecto rejected his application and the order was confirmed in appeal by the Collector. The applicant has preferred a revision application to the Commissioner. The question raised for the consideration of the R.L.A. is whether the commutation is valid and binding and whether a suit if filed would be defensible.

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2. It appears that the question raised by the Commissioner does not arise now. Govind Krishnaji whose right of service was commuted is still alive and he has not applied for setting aside the order of commutation passed by the Collector under section 15 of the Bombay Hereditary Offices Act. So long as Krishnaji Govind is alive the applicant gets no rights to the hereditary office Consequently there appears no legal objection to rejecting the application on the ground that the applicant has no right to challenge the validity of the commutation when his father Govind Krishnaji on whose consent the commutation was ordered is silent nd has not joined him in this application.

3. It appears that even if a suit is filed, it would be defensible. The first question for consideration is whether the commutation is valid. For a valid commutation under section 15 of the Bombay HereditaryOffices Act the following ingredients are necessary:

4. (1) a written consent of the hoder of a watan and

(2) compliance with the provisions of clause(1) of section 73 which contemplate and inquiry or investigation. What is therefore material is whether there was written consent of Govind Krishana for commutation. It is true that Govind Krishnaji gave his consent in writing; but that was subject to a condition that he should be appointed talati for that village till he attained the age of 55. The acceptance of the consent of Govind Krishnaji by the Collector for commutation would be deemed to be subject to the condition of Govind Krishnaji's appointment as talati of Hirekamashi and unless it was either withdrawn or waived the Collector was bound to appoint him as talati .But it appears that Hirekamashi was too small for being constituted into a "saza" for appointment of a talati and conseqnetly he was offered the post of the talati ~~and consequetly he was offered the post of the talti~~ of Chikkamashi Shirgod which he declined, whereupon at his own request he was appointed.

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Amani Kulkarni of his own village i.e. Hirekanashi.

It is true that in 1920 he raised a protest demanding either cancellation of ~~communication~~ Commutation or his appointment as talati in pursuance of the condition attached to his offer of ~~communication~~ Commutation. But Government ~~informed~~ informed him that he had been appointed Amani Kulkarni at his own request and that nothing could be done unless the Kulkarni of Gondi consented to ~~communication~~ Commutation. Thereafter Govind Krishnaji kept silent and went on serving as Amani Kulkarni of Hirekanashi until 1940 when he retired. Ever since ~~communication~~ Commutation i.e. 1917 he has been receiving one-third notgi allowance under the ~~communication~~ Commutation settlement. These are hard facts which are borne out by documentary evidence and admission of Govind Krishnaji. He would therefore be estopped from contending that he had not consented to the terms of the ~~communication~~ Commutation which he has so long acted upon and derived benefit under. " The connection between estoppel and waiver is very close. Between the two there is this broad ground in common viz. the object and operation of both is to insure bonafides and to safeguard transactions. Whenever a party having a right to insist upon something or other being done, does not insist upon that being done, and with a knowledge that it has not been done goes on dealing in the matter, just as though everything had been duly done, the natural inference from his conduct is that he has waived or dispensed with the doing of it; in which case of course, he cannot afterwards raise the objection that it was not done. As regards cases of waiver Bigelow observes; " It appears to be little, if anything, more than giving them a new name to call them estoppel (Bigelow p. 660)" (Sarkar's Evidence Act, 6th Edition p. 994). The proper inference in the present case would be one of waiver or estoppel and it would not be open to Govind Krishnaji to revoke his consent which has now become irretractable. If the commutation settlement is binding

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on Govind Krishnaji it is equally binding on his son, the present applicant (see clause 3 of section 15 of the Bombay Hereditary Offices Act; Secretary of State vs. Yellow Ramachandra 30 B.L.R. 581).

4. Apart from merits it appears that a suit if filed by the applicant or his father or both would be barred by limitation under Article 124 of the First Schedule to the Indian Limitation Act, 1908, (though not by ~~Article~~ Article 14 of that Act or by section 4(a) of the Bombay Revenue Jurisdiction Act, 1876).

sd/- P.M.M.

Remembrancer of Legal Affairs.

U. O. to R.D. No. 7241 dated the 8th September, 1913.

Madhav Rao Sadan.

7/5/56.

C/4.

No. P- appeals/1942,
Via Poona, 22nd June, 1942.

From

Sir Govind Madgavkar I.C.S.(Retd.),
President, Bombay Revenue
Tribunal.

To

The Secretary to Government,
Legal Department, Secretariat,
BOMBAY.

Subject : Alienation of Service-
Inam land of S. No. 105 of
Viramgam.

Sir,

In accordance with Regulation 14 of the Regulations of the Bombay Revenue Tribunal, I have the honour to forward herewith the record and proceedings in the appeal of Bai Lalita w/o Purshottam Keshavlal of Viramgam, pending before the Tribunal, for favour of your opinion on the order of the Collector of Ahmedabad which is the subject of the appeal.

2. The opinions of the Commissioner, N. D. and the Non-official Member accompany. All the papers, including the record and proceedings of the Collector may kindly be returned to me with your opinion within two months.

Your obedient servant,

sd/- G.M. Madgavkar.

President,

Bombay Revenue Tribunal.

Bhikhav Bachadan.

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No. 6837.

Legal Department.

Bombay Castle, 22nd August, 1943.

From

P. N. Moos, Esquire, Bar-at-law, I.C.S.,
Secretary to the Government of Bombay;

To

The President,
Bombay Revenue Tribunal,

Subject:- Alienation of service inam land of S. No. 105 of Viramgam.

Sir,

With reference to your letter No. P.- Appeals/1942, dated the 22nd June 1942, I have the honour to forward herewith my opinion on the question raised therein.

All the papers received with your letter under reference are returned herewith.

Your obedient servant,

sd/- P.N.M.

22/8/43.

Secretary to the Government of Bombay,

LEGAL DEPARTMENT.

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Opinion.

The facts of the case are as follow:-

S.No. 165 of Viramgam admeasuring 4a- 24 g. assessed at Rs. 12-4 12-4-0(Judi Rs.") is service Inam land of class VI village servants useful to Government assigned for remuneration of Matadar service. The deceased Matadar Keshavlal leased 3 a. -10 g of this land for 99 years to the owner of the Chandrodaya Mills in 1909 and the rent fixed was Rs. 75 per acre and the rest of the land was leased to the same lessee in 1913 for 49 years and the rent fixed was Rs. 840 per year in lump. The Matadar Keshavlal died in 1927. The alienation was detected in 1935 and this led to certain correspondence between the Collector of Ahmedabad and the Commissioner, Northern Division (Pages 203-217 of PP. below). In the meantime, the Assistant Collector, Viramgam Prant, on 27-2-1939, passed an order under section 11 of the Bombay Hereditary Offices Act, 1874, declaring the alienations null and void and on 27-6-1939, directed the levy of full rent at Rs. 870 per annum and held that as this sum was clearly excessive remuneration for a matadar of Viramgam, assigned out of that amount only Rs.36/- per annum to the Matadar as remuneration under section 23. Bai Lalita the officiating Matadar(the lessee's predeceased son's widow) then appealed to the Collector of Ahmedabad against this order. On 23-3-1940 the Collector of Ahmedabad cancelled the Asistant Collector's order and directed that the land should be entered as private Khalsa and should be removed from the Inam category and that full non-agricultural assessment should be levied and credited to Government. Against this order Bai Lalita has appealed to the Bombay Revenue Tribunal. The Commissioner, member of the Bombay Revenue Tribunal is of opinion that the Collector's order for resuming the land by levying non-agricultural assessment and removing it from the category of Inam land is not valid under sections 11-A of the Bombay Hereditary Offices Act read with the Matadars Act and the order should be set aside. He is of opinion that Government has no effective remedy in a case of this kind. The non official member (Mr.P.B. Shingne) is also of the opinion that Rule 4 of the Resumption Rules does not apply to this case and that the Collector's order is opposed to the provisions of sections 11 and 11-A of the Bombay Hereditary Offices Act. The President, Bombay Revenue Tribunal has referred the papers to the P.T.O

the papers to the Remembrancer of Legal Affairs for his opinion on the order of the Collector of Ahmedabad dated 29-3-1940 which is appealed against.

2. The legal effect of the order of the Collector is resumption in favour of Government by levy of full assessment. The question whether the grant was of revenue or of soil would be relevant only when the resumption can be validly made, otherwise such question would be merely academic. What is therefore pertinant for the purpose is to consider in the first instance whether the order of resumption passed by the Collector is lawful.

3. By virtue of section 4 read with section 3(1) of the Matadars Act, 1886, the provisions of sections 5 to 18 of the of the Bombay Herditary offices Act, 1874, apply to a mata, the grant being treated as a watan. The Resumption Rules framed by Government in exercise of powers conferred by act XI of 1852 schedule B, sections 8 and 10 and and by Bombay Act VII of 1863, section 2 and of all other powers enabling Government in this behalf will also apply to mata land such land being one held for sergice to Government (See Bombay Hereditary Offices Act, section 1 clause 2; ef cf. Vishnu V. Shankar, 35 B.L.R. 114). The resumption of mata lands can, therefore, be made under the following provisions;

(1) under section 11-A of the Bombay Hereditary Offices,

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(2) under the proviso to rule 4 of the Resumption Rules; or

(3) under rule 5 of the Resumption Rules.

The question for consideration is whether the Collector's order resuming the mata land by levy of full assessment is referable to any of these provisions.

4. Section 11-A of the Bombay Hereditary Offices Act provides that the Collector shall either summarily resume possession of all property to which an order of a court passed on receipt of his certificate under section 11 relates or his own declaration under section 11, relates or assess it at the rate prescribed in clause (2) of section 9, as he may think fit, and the said property shall thence forward revert to the watan. The words "revert to the watan" clearly indicate that under section 11-A the property can be restored from the alienee to the watandar entitled thereto. In other words section 11-A does not empower the Collector to "resume the land on behalf of Government so as to place the land at the disposal of Government and deprive both the alienee and the watandar otherwise entitled thereto, of possession thereof" (see G. R. No. 5964, dated 25th August 1899 quoted in Phadnis's Watan Act, Edition V, Part II at p. 125). The order of resumption passed by the Collector in the present case does not obviously fall within the purview of section 11-A, the resumption being on behalf of Government.

5. Rule of the Resumption Rules relates to service lands. The proviso to rule 4 provides for Resumption of service lands on behalf of Government in the following circumstances :-

(1) when the Collector is satisfied

(a) that the service in respect of which any such lands are held, is not longer performed; or

(b) that its performance is no longer necessary;

(c) that for the service performed the remuneration derived from the profits of the enjoyment of such

lands is unnecessarily high; or

(3) in the case of service lands to which the provisions of Bombay Act III of 1874 do not apply, if it shall appear,

(a) that the holder has been guilty of any serious misconduct; or

(b) that such lands or any part thereof has or have by succession or otherwise come into the possession of female or of any person other than the person who for the time being is duly authorised to perform or does actually perform the service in respect of which such lands are held.

6. The said land was not resumed by the Collector in the present case on any of the grounds in circumstance, No. 1 mentioned above, since he has not rested his decision on the question of the necessity or adequacy of the remuneration. The Bombay Hereditary Offices Act (Bom. Act III of 1874) applies to said land. Consequently circumstances No. 3 has no application to the present resumption. It will thus be seen that the proviso to rule 4 has no relevance to the present case and the resumption order of the Collector cannot be supported under that provision.

7. Rule 3 of the Resumption Rules inter alia provides that in every case contemplated by rules Nos. 3 and 4, if any land held for service or any of the profits thereof shall at any time be or become alienated contrary to the provisions of Bombay Act III of 1874, or of any other law for the time being in force the said land shall, if the Collector deems fit, be forthwith resumed anything in the said rules to the contrary notwithstanding. " In every case contemplated by rule 4" means in every case relating to service lands which do not fall under rules Nos. 2 and 3 (see Thakur's law of Evictions and Inams, p. 76). The words " anything in the said rules to the contrary

contrary notwithstanding " indicate that this rule applies even if there is any doubt as to the application of proviso to rule 4 to any particular case. Rule 6 makes it clear that resumption under rule 5 is a resumption on behalf of Government. In the present case the suit land was leased out without the sanction of the proper authority to a non-watadar beyound the term of the natural life of the watadar Keshavlal. The lease was therefore contrary to the provisions of section 5 of the Watan Act and consequently the order of resumption of the grant passed by the Collector is valid, it being referable to rule 5 of the Resumption Rules and not to sections 11 and 11-A of the Watan Act. Since resumption under the said rule 5 by Government can be made of what is granted by Government and since the Collector found that there was no evidence to prove that the grant in the present case was of soil, the Collector's order resuming the grant by levy of full assessment and removing the land from the category of Inam land would appear to be competent and correct. (See Bom. G.R. No.3964 dated 25th August 1899 quoted above.).

Sd/- P.N.M.
21/8/42
Secretary to the Government of Bombay,
Legal Department.

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